Supreme Court, U.S.
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No.

In the Supreme Court of the United States

MICHAEL D. STRICKLAND
Petitioner

v.

RICHARD DANZIG, Secretary of the Navy, VICE ADMIRAL DANIEL T. OLIVER, Chief of Naval Personnel, COMMANDER RICHARD LOTH, Commanding Officer, Special Boat Unit Twenty-Two, LCDR R. E. MILLER, Officer in Charge, Personnel Support Detachment
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Fifth Circuit Erred in Dismissing Petitioner's Appeal for Failure to Exhaust Administrative Remedies.

II. Whether the Fifth Circuit Erred in Denying Injunctive Relief As Moot When Relief Would Mitigate the Damage Suffered By the Petitioner.

III Whether the Fifth Circuit Erred In Denying Relief In Light of Petitioner's Right to Due Process.

IV. Whether the Navy Can Arbitrarily and Capriciously Discharge Petitioner.

V. Whether the Navy Can Discharge Petitioner When the Decision Is Unsupported by Substantial Evidence.

VI. Whether the Deference Afforded Military Decisions Should Attach to the Field Officers When Their Determinations Conflict With the Headquarters Staffs.

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BASIS FOR JURISDICTION

These issues are properly before the Supreme Court of the United States pursuant to 28 U.S.C. § 1254 and Rule 10 of the Supreme Court rules which govern the review on Certiorari. The final judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 9th, 2000. The submission for filing is within the 90 day requirement of Rule 13.1 of the Supreme Court Rules. This proceeding does not question the constitutionality of any Act of Congress or any State Legislature. Consequently, the provisions of Rule 29.4(b) and (c) do not apply.

CORPORATE DISCLOSURE STATEMENT

This document has not been filed on behalf of a nongovernmental corporation within the scope of Rule 29.6

PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

The following constitutional provisions treaties, statutes, ordinances and regulations re applicable to this proceeding:

5 U.S.C. § 704

5 U.S.C. § 706

10 U.S.C. § 890

10 U.S.C. § 1169

10 U.S.C. § 1552

Fla. St. § 800.03

Fla. St. § 800.04

Florida Rule of Criminal Procedure Rule 3.670

32 C.F.R. Pt. 41 App. A

32 C.F.R. 700.802

SECNAVINST 1910.4B

MILPERSMAN

Pertinent text of citations are set out in the appendix.

STATEMENT OF THE CASE

For seventeen years, petitioner, Gunners Mate First Class Petty Officer Michael Strickland was an exceptional sailor in the United States Navy. While stationed aboard the *USS Spruance* (DD-963), in March 1998, petitioner was arrested by the Jacksonville Beach Police Department for lewd, lascivious or indecent assault or act upon or in the presence of a child. (Fla. St. § 800.04) The arrest occurred after petitioner shook sand out of his shorts on a beach after dark one evening in an area he thought was protected from public view.

Mr. Strickland consulted with his superior who then discussed the case with a representative of Navy JAG. Based on assurances that the Navy would take no action against him, petitioner plead *nolo contendere* to a misdemeanor charge of indecent exposure on July 10, 1998. (Fla. St. § 800.03). Adjudication of guilt or innocence was withheld pursuant to Florida Rule of Criminal Procedure Rule 3.670

and he was placed on probation for one year..

The Commanding Officer was ordered by higher authority to process petitioner for administrative separation and on December 9, 1998 he appointed an administrative board to consider whether petitioner committed misconduct and whether he should be retained in the naval service. The next day an administrative board was held pursuant to the Military Personnel Manual (MILPERSMAN) to consider petitioner's case. By a unanimous vote, the administrative board found that the evidence did not support the basis for separation by reason of a civilian conviction and that petitioner should be retained in the naval service. (R. 58)[1]. The Commanding Officer of the *USS Spruance* (DD 963) concurred with the findings and recommendations of the administrative discharge board.

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[1] At the urging of the government representative, known as the recorder, the board after announcing findings changed their decision to indicate that Strickland had committed misconduct because of a civilian conviction.

On or about January 25, 1999 petitioner transferred to the Special Boat Unit Twenty-Two. In May of 1998, without notice to the petitioner or his Commanding Officer, the Bureau of Personnel submitted the package to the Assistant Secretary of the Navy for Manpower and Reserve Affairs arguing that the decision of the field commanders and operational officers be set aside. Papers submitted to the Assistant Secretary were not provided to Strickland as required by regulations. The Secretary ordered petitioner discharged from the Navy for misconduct with a general discharge under honorable conditions.

Petitioner filed the instant action on June 24th, 1999, and a Temporary Restraining Order (TRO) was granted by the district court on June 25, 1999. The TRO was extended on July 26, 1999 until August 9, 1999. On October 29, 1999, defendants-appellees filed a Motion to Dismiss under Federal Rules of Civil Procedure Rule 12(b)(6) or in the Alternative For Summary Judgment. Petitioner filed an opposition and

Cross-Motion for Summary Judgment on November 4, 1999. On January 14, 2000, the court granted respondent's Motion to Dismiss or in the Alternative for Summary Judgment and denied petitioner's Cross-Motion for Summary Judgement. On January 20, 2000, petitioner filed a request for stay in the District Court which was later denied.

This case is related to the case of *Konwinski v. Dalton,* which is also before this Court on a petition for *certiorari*. As in the instant case, Konwinski was discharged despite the findings of an administrative discharge board and the recommendations of two Commanding Officers. Several of the questions for review in this case are the same or similar to the questions submitted in the *Konwinski* case.

ARGUMENT

I. The Fifth Circuit Erred in Dismissing the Appeal for Failure to Exhaust Administrative Remedies

The enabling statute for the Board for Correction of Naval Records (BCNR), 10 U.S.C. § 1552, allows but does

not require the Secretary to correct records. The BCNR and other correction boards were established primarily to relieve Congress of the need for submitting private bills to correct injustices in military records. *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974), *on reh'g*, 505 F.2d 857, *cert. denied* 421 U.S. 1011. Present or former military members have complete discretion as to whether they would request relief. Nothing in the statute or the legislative history indicates a Congressional intent for these boards to constitute a preliminary step before requesting judicial review.

The exhaustion requirement was judge made law rather than statutory law. *Ballenger v. Marsh*, 708 F.2d 349. (8th Cir. 1983); *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975); *Mindes v. Seaman* 453 F.2d 197 (5th Cir. 1971). Some courts argued that this requirement was discretionary. *Rolles v. Civil Service Commission*, 512 F.2d 1319 (D. C. Cir. 1975), *Ogden v. Zuckert*, 298 F.2d 312, (D.C. Cir. 1961). Additionally, a myriad of exceptions

have grown out of the case law which excused the exhaustion requirement including: (1) the remedies do not provide an opportunity for adequate relief; (2) the petitioner will suffer irreparable harm if compelled to seek administrative relief; (3) an administrative appeal would be futile; or (4) substantial constitutional questions are raised. *Von Hoffburg v. Alexander*, 615 F.2d 633, 638 (5th Cir.1980).

The military itself has recognized the lack of statutory basis for requiring an application to the BCNR. Barto, *Judicial Review of Military Administrative Decisions After Darby v. Cisneros*, 1994-SEP ARMY LAW. 3, 8 (Sep. 1994). The Department of Defense (DOD) has considered three proposals to amend Title 10 of the United States Code to require military personnel to seek relief from the service correction boards prior to requesting judicial review. *See*, Smith, *The Military Personnel Review Act: Department of Defense's Statutory Fix for Darby v. Cisneros*, 1997-FEB ARMY LAW. 3 (Feb. 1997). They included a mandatory

exhaustion requirement in their proposed Military Personnel Review Act of 1997. *See*, Chapman, *The Military Personnel Review Act of 1997*, 1997-MAY ARMY LAW. 74 (May 1997).

Absent Congressional action, a court cannot create a mandatory exhaustion requirement. It is well settled that courts must give effect to the unambiguously expressed intent of Congress. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Congress has enacted mandatory administrative remedies. (ie. Board of Veterans Appeals, Merit Systems Protection Board, etc.) They did not do so for military correction boards, even when DOD asked them to do so in 1997.

The United States Court of Federal Claims, who often reviews BCNR does require an application to the correction boards. *West v. United States*, 35 Fed. Cl. 226, 230 (1996); *Heisig v. United States*, 719 F.2d 1153, 1155 (Fed.Cir.1983).

The doctrine of exhaustion of administrative remedies has undergone close judicial scrutiny. More specifically, this

Court has ruled that when the Administrative Procedures Act (APA) is invoked, and the relevant statute does not specifically mandate exhaustion, federal courts can not require a plaintiff to exhaust available administrative remedies. *Darby v. Cisneros*, 509 U.S. 137 (1993).

It is undisputed that the APA applies to the type of proceedings in question. *Nicholson v. Brown*, 559 F.2d 639 (5th Cir. 1979); *Phillips v. United States*, 910 F.Supp. 101 (E.D. NY 1996). Petitioner has repeatedly invoked the APA. Under *Darby*, an agency administrative appeal is only required when the agency adopts a rule mandating an appeal before judicial review and ensuring that the initial decision would be "inoperative" pending appeal. 5 U.S.C. § 704, *Darby*, 509 U.S. at 152. Here, the decision to discharge petitioner was executed. Accordingly, it was a final action under *Darby*. Nor is there any military exception to *Darby*. *St. Clair v. Secretary of the Navy*, 970 F.Supp. 645, 648 (C.D. Ill 1997).

Courts have almost uniformly applied *Darby* to the military arena. *Dowds v. Clinton*, 18 F.3d 953 (D.C.Cir. 1994). *Perez v. United States*, 850 F.Supp 1354, 1360 (1994). *Watson v. Perry*, 918 F.Supp 1403, 1411 (W.D. Wash. 1996). *But see*, *Saad v. Dalton*, 846 F.Supp 889 (1994).[2] One military commentator indicated that the current state of the law is that *Darby* controls in the military context. *See* Barto, *supra*. 1994-SEP ARMY LAW. at 3.

Absent a requirement to submit a petition to the BCNR, the exhaustion of the BCNR remedy is not required. The Fifth Circuit erred in dismissing the appeal based on the exhaustion doctrine. In doing so they disagreed with the law in force in the Federal and District of Columbia Circuits. Pursuant to Rule 10(a), this matter is appropriate for certiorari. Additionally, the Fifth Circuit has conflicted with

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[2] In *Saad* the Administrative Procedures Act (APA) was not invoked by the plaintiff. The cased turned on equal protection grounds.

this Court's rulings in *Darby, supra.* to the extent that review is proper under Rule 10(c).

II. The Fifth Circuit Erred in Denying Injunctive Relief As Moot When Relief Would Mitigate the Damage Suffered By the Petitioner

Although the district court denied that the harm was irreparable, the Fifth Circuit found that because the harm was irreparable petitioner's claims were moot. This, of course, begs the question as to whether or not petitioner suffered irreparable harm.

This action was brought under the APA to review the arbitrary and capricious actions of the agency that were unsupported by substantial evidence and in violation of the Constitution and laws of the United States and the agency's own regulations. Pursuant to 5 U.S.C. § 706, the courts had the power to fashion an appropriate remedy including returning petitioner to active duty with back pay and allowances. It is true that some harm cannot be corrected. Petitioner will have an unexplained hole in his record that can

be expected to generate speculation on the part of promotion boards. He will not be assigned to another Special Warfare command such as a Special Boat Unit. He will probably never make Chief Petty Officer. This will permanently impact his retirement pay and future career plans.

Action by the courts can mitigate these damages, however. Currently, petitioner has been tossed onto the street without pay and allowances, separation pay or the possibility of retirement. He has been deprived of a lifetime of medical and dental care as well as other privileges. Returning him to active duty would allow him to regain these benefits and partially mitigate the irreparable harm that has befallen him.

Federal courts have jurisdiction to review military discharge proceedings to determine whether an official acted outside of the scope of his powers. *Harmon v. Brucker*, 355 U.S. 579 (1958). Federal courts may also review those decisions for fairness and reasonableness. *Van Bourg v. Nitze*, 388 F.2d 557 (D.C. Cir. 1967). They routinely review

cases in which it is alleged that the military services have failed to follow their own rules, regulations, policies, or procedures. *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978); *Rucker v. Secretary of the Air Force*, 702 F.2d 966 (11th Cir. 1983); *Sargisson v. United States*, 913 F.2d 918, 921 (Fed. Cir. 1990). Issues concerning discharge procedures are matters of compliance with the law and their review is a judicial responsibility. *Holley v. United States*, 124 F.3d 1462 (Fed. Cir. 1997).

Here the Fifth Circuit is in conflict with a number of other Circuits including the 9th, 11th, District of Columbia and Federal Circuits. Accordingly a review under Rule 10(a) is warranted Additionally, the Fifth Circuit has conflicted with this Court's rulings in *Harmon, supra.* to the extent that review is proper under Rule 10(c).

III. The Fifth Circuit Erred In Denying Relief In Light of Petitioner's Right to Due Process

The trial court denied petitioner's significant

Constitutional claims. This is in contrast to the well settled proposition that violations of the Constitution are justiciable. *Wigginton v. Centracchio*, 205 F.3d (1st Cir. 2000); *Mullally v. United States*, 95 F.3d 12 (8th Cir. 1996); *Padula v. Webster*, 822 F.2d 97 (D.C.Cir.1987); *Dillard v. Brown*, 65 F.2d 316 (3rd Cir. 1981).

Review under the due process clause of the Constitution is limited to those instances where the plaintiff can demonstrate a liberty or property interest. In this case, Petty Officer Strickland has both.

A liberty interest in governmental employment is implicated if the individual's good name, reputation, honor or integrity are at stake, or if the governmental action could impose a stigma or other liability that could prejudice other employment opportunities. *Perry v. FBI*, 781 F.2d 1294, 1300 (7th Cir. 1986). Petitioner's reputation and good name were placed at stake. The discharge certificate (DD-214) indicates that plaintiff's separation was a General discharge

for "Misconduct." Additionally, the separation is sufficient stigma to invoke a liberty interest. *Casey v. United States* 8 Cl.Ct. 234 (1985). *See also, Perez v. United States,* 850 F.Supp 1354 (N.D. Ill. 1994)., *Milas v. United States*, 42 Fed. Cl. 704 (1999), *aff'd* 217 F.3d 854 (Fed. Cir. 1999).

Petitioner also enjoys a property interest in his naval career. Property rights in government benefits, including employment benefits, are based on statutory eligibility. *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Goldberg*, the Supreme Court held that statutory entitlement can trigger a property interest under the due process clause. A "legitimate claim of entitlement" was determines if a property interest existed. *Board of Regents v. Roth, 408 U.S. 564, 577 (1972).*

Petty Officer Strickland has an absolute right to due process of law. In *May v. Gray*, 708 F.Supp. 716 (E.D. N.C. 1988), the court relied on 10 U.S.C. § 1169 to distinguish the "at will" status of active duty officers and inactive reservists to find that an active duty regular enlisted member has a

Constitutionally recognized property interest and legitimate claim of entitlement to his or her job. *See also, Perez, supra. But see, Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991) and *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir 1984).

In *United States v. Gansemer*, 38 M.J. 340, 341 (C.M.A. 1993), the Court of Military Appeals (now the United States Court of Appeals for the Armed Forces) found that "[w]ith regard to administrative-discharge procedures, a servicemember is afforded many due process protections, mostly spelled out in service regulations but having their foundation in the Constitutional principle that no person may be deprived of property without due process of law." 38 M.J. 341. The military court also noted that, pursuant to 10 U.S.C. § 1169, an administrative discharge must be based on appropriate authority. *Id.*

Once it has been established that the due process clause attaches to petitioner 's case, the next step is to

determine what process is due. The Supreme Court has held that at a minimum, there must be notice and an opportunity to be heard. In *Goldberg, supra*, Justice Brennan held that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Goldberg*, 397 U.S. at 270. *See, also, Greene v. McElroy*, 360 U.S. 474 (1959).

One of the more draconian actions taken against Strickland was the proceeding held by the secretary which reversed the findings of the administrative discharge board and the two operational Commanding Officers. These deliberations were taken in a vacuum without allowing the applicant to review, contest or refute the basis of the findings.

The MILPERSMAN required that petitioner be given copies of the documents forwarded to the Secretariat. This would have partially met the minimum due process

requirements of providing the petitioner notice. The Navy's refusal to provide Strickland with a copy of the memorandum forwarded to the Secretary of the Navy was a breach of due process as well as their own regulations. *Holley v. United States*, 124 F.3d 1462, 1469-70 (Fed. Cir. 1997).

Notice and an opportunity to be heard at a meaningful time and in a meaningful manner are essential elements of due process. *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 315 (5th Cir.1997). Here Strickland was not notified that his board was reversed. This deprived him of the opportunity to present his case to the Assistant Secretary.

It is fundamental to our system of jurisprudence that the defendant has a right to defend himself or herself. Here, the defendant was effectively re-tried and found guilty without an opportunity to present any evidence on his behalf. Instead, his fate was decided in what can only be described as a modern day Star Chamber without even a record of the proceedings or deliberations.

Here Fifth Circuit deprived Strickland of proper judicial review of his Constitutional and statutory questions. In doing so they disagreed with the law in force in the First, Third and Eighth Circuits and the military court of last resort. Per Rule 10(a), this matter is appropriate for certiorari. Additionally, the Fifth Circuit has conflicted with this Court's rulings in *Greene*, *Goldberg* and *Board of Regents, supra.* to the extent that review is proper under Rule 10(c).

IV. The Secretary of the Navy Cannot Arbitrarily and Capriciously Discharge Petitioner from the United States Navy

It is well settled in the jurisprudence of this Court and the other Appellate Circuits that an agency cannot act arbitrarily and capriciously in performing their functions. *Motor Vehicle Mfrs Ass'n of U.S. Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Santa Fe Energy Products Co. v. McCutcheon*, 90 F.3d 409 (10th Cir. 1996). A court must ascertain the facts on which the agency

made its decision, determine whether those facts have some basis in the record and judge whether a reasonable decision maker could respond to the facts as the agency did. *Recording Industry Ass'n of America v. Copyright Royalty Tribunal*, 662 F.2d 1 (C.A.D.C. 1981). The Court must also determine whether the agency's decision was based on the consideration of relevant factors and whether there was a clear error of judgment. *Virginia Agr. Growers Ass'n, Inc. v. Donovan*, 774 F.2d 89 (4th Cir. 1985). *See also, O'Keefe's Inc. v. U. S. Consumer Product Safety Com'n*, 92 F.3d 940 (9th Cir. 1996). In the instant case, the Secretary acted arbitrarily and capriciously in discharging petitioner.

In the instant case, it was Navy representatives who induced Strickland to agree to a plea bargain. It is arbitrary and capricious and fundamentally unfair to induce someone to enter a plead of *nolo contendere* to a criminal matter with assurances that they will not be administratively separated and then administratively separate them for entering that plea.

Administrative discharges based upon erroneous legal advice are arbitrary and capacious and cannot stand. *White v. Secretary of the Army*, 878 F.2d 501 (D. C. Cir. 1989). *See also, Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970)

Additionally, the Secretary acted improperly in discharging petitioner based on a civilian conviction because petitioner was not convicted. Adjudication of guilt or innocence was withheld pursuant to Florida Rule of Criminal Procedure Rule 3.670. Strickland neither plead guilty nor was he convicted by a jury. He plead *nolo contendere*. With a *nolo* plea and no jury conviction, there is no conviction unless the court adjudicates guilt. *Raulerson v. State*, 699 So.2d 339 (Fla 5th Dist. C. App. 1997). It is well settled that under Florida law, "a defendant who has adjudication of guilt withheld and successfully completes the term of probation imposed 'is not a convicted person.'" *State v. Gloster*, 703 So.2d 1174 (Fl. Dist. Ct. App. 1. Dist. 1997). The petitioner's term of probation was completed in July 1999.

Therefore, he cannot be considered a convicted person.

As discussed *supra*, a service member may not be separated for conduct that has been the subject of judicial proceedings resulting in the acquittal or action having the effect thereof. ¶ 3a of part 2 of enclosure 2 page 2-3 of SECNAVINST 1910.4B. Here the effect of the action was the same as an acquittal. No conviction was ever entered.

Additionally, the Secretary failed to consider Strickland's potential for rehabilitation as required by 32 C.F.R. Pt. 41 App. A. Consideration of the potential for rehabilitation is an absolute requirement, when, as here, separation is not mandatory.[3] Thus the Secretary was required to consider the potential for rehabilitation.

The separation authority also acted arbitrarily and capriciously in failing to consider the six retention factors

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[3] Although administrative processing is arguably required in this case, separation is not required but is to be determined based on the findings of the administrative board.

delineated in 32 C.F.R. Pt. 41 App. A, part 2(A)(2).[4] The Secretary of Defense stated that the separation authority "should" consider the six factors. Absent some sort of reasoned analysis, a failure to consider them is an arbitrary and capricious action since an agency's decision must not fail to consider an important aspect of the problem. *Motor Vehicles Mfrs. Ass'n* supra., 463 U.S. at 43. Here, the question of whether Strickland should have been retained was the central issue. In failing to consider the retention factors, the Assistant Secretary ignored the core issue.

The Fifth Circuit is in conflict with a number of other Circuits including the Fourth, Ninth, Tenth and District of Columbia Circuits. Accordingly a review under Rule 10(a) is appropriate. Additionally, the Fifth Circuit has conflicted with this Court's rulings to the extent that review is proper under Rule 10(c).

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[4] The factors were repeated in the Military Personnel Manual (MILPERSMAN).

V. The Secretary of the Navy Cannot Discharge Petitioner from the Navy When the Decision Is Unsupported by Substantial Evidence

The jurisprudence has consistently held that an agency's decision must be supported by substantial evidence. *Caiola v. Carroll*, 851 F.2d 395 (D.C. Cir. 1988); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490 (2nd Cir. 1999); *Jones v. Priebe*, 489 F.2d 709 (6th Cir. 1973); *Northern Mont. Health Care Ctr. V. NLRB*, 178 F.3d 1089 (9th Cir. 1999). Substantial evidence requires evidence that a reasonable mind might accept as adequate to support a conclusion. *Universal Camera v. NLRB*, 340 U.S. 474 (1951). A court must ask whether a "reasonable mind might accept a particular evidentiary record" to support the decision. *Dickinson v. Zurko*, 527 U.S. 150 (1999).

The very weak evidence against petitioner was counterbalanced by sworn testimony and the totality of the facts and circumstances surrounding the incident. The board properly considered all evidence and determined that the

preponderance of evidence did not support the proposition that the specific circumstances warranted separation.

The memorandum from the Chief of Naval Personnel to the Assistant Secretary of the Navy provided false and misleading information. The memo's implication was that Strickland was convicted - when in fact he was not.

The failure of the Assistant Secretary to provide a brief statement of reasons or to otherwise document her reasoning on the record prevents a quick determination of whether the decision was properly supported by substantial evidence. Absent any evidence to the contrary there is no basis for finding that the decision of the Separation Authority was supported by substantial evidence.

The Fifth Circuit is in conflict with a number of other Circuits including the Second, Sixth, Ninth and District of Columbia Circuits. Accordingly a review under Rule 10(a) is warranted. Additionally, the Fifth Circuit has conflicted with this Court's rulings in *Universal Camera* and *Dickinson v.*

Zurko, supra., to the extent that review is proper under Rule 10(c). If this Court does not grant the petition for a writ of certiorari, there will be confusion on a subject that goes to the heart of APA judicial review

VI. The Deference Afforded Military Decisions Should Attach to the Field Officers When Their Determinations Conflict With the Headquarters Staffs

Judicial deference to military authorities is required to allow the military to accomplish its mission by fostering instinctive obedience, unity, commitment, and esprit de corps. *Greer v. Spock,* 424 U.S. 828, 843-844 (1976) (POWELL, J., concurring). Additionally it is difficult for courts to determine the impact upon discipline of any particular decision. *Chapel v. Wallace*, 462 U.S. 296, 305 (1983). In the instant case, there is tension between two levels of the chain of command. On one side the operational forces felt that retaining Strickland would best benefit overall unity, commitment, esprit de corps and discipline. This

sentiment was not shared by the Bureau of Personnel several hundred miles away in Millington Tennessee or the Secretariat, a thousand miles away in Washington. The courts below attached the discretion to the headquarters staffs who are far removed from the units. Petitioner argues that the discretion must remain with the operational Commanding Officers. This appears to be a case of first impression and the court must decide at what level the deference properly lies.

Certainly an administrative board as the finder of fact must be allowed to exercise discretion. Otherwise the board would be useless surplusage rather than real due process. In effect the Secretary and the courts below substituted their judgment for that of the administrative discharge board. It is well settled that a presumption of regularity attached to the members of the administrative discharge board. *Brooks v. United States*, 213 Ct.Cl. 115, 121 (1977); *Boyd v. United States*, 207 Ct.Cl. 1, 9 (1975), *cert. denied*, 424 U.S. 911, (1976); *Crispino v. United States*, 3 Cl.Ct. 306, 312 (1983).

Only the administrative board is empowered to make the finding as to whether misconduct occurred. No regulation grants a reviewing or separation authority the right to make a *de novo* review of that finding. Since the record does not reveal any evidence of bad faith on the part of the board members the courts should not disturb their findings.

While there is no documented case law discussing a reversal of an administrative discharge board by the Secretary, there is ample authority concerning reversals of other administrative bodies such as record correction boards. In overturning a correction board, the Secretary must not act in an arbitrary, capricious manner, unsupported by substantial evidence, or in violation of law. The actions of the Secretary are subject to judicial reversal for violation of such standards. *Sanders v. United States* 594 F.2d 804 (Ct. Cl. 1979). The Secretary can only reverse a correction board based on explicitly stated policy reasons, or upon evidence presented in the record made to the Board. *Horn v. Schlesinger*, 514 F.2d

549, 553 (8th Cir. 1975). *See also*, *Nelson* v. Miller, 373 F.2d 474, 478 (3rd Cir. 1967), *cert. denied*, 387 U.S. 924 (1967). Here, the Secretary improperly based his decision on a memo that was not made available to the board or to Strickland.

No one contests the need for judicial deference to military discretion and expertise. It is not the place of the courts to adjudicate an operational Commanding Officer's orders. Congress requires that military orders be obeyed promptly and completely. *See, e.g.* 10 U.S.C. § 890. Otherwise, lives will be lost and tactical opportunities missed while a judicial debate rages.

For judicial deference to be most effective, it must attach to field commanders. They are the people closest to the problem and those charged with solving those problems. The Navy has given their Commanding Officers ultimate responsibility for their commands. 32 C.F.R. 700.802(a). This includes the authority to depart from his or her orders and instructions, upon his own responsibility. 32 C.F.R.

700.802(b). No other officer at any level of the chain of command is tasked with the ultimate responsibility for his command. Consequently, the deference must be at its apogee when reviewing the decisions of a Commanding Officer and at its perigee when reviewing those overruling his decisions.

With due respect to the Secretary and to the Bureau of Personnel, they were not the finders of fact and did not see the evidence or testimony in this case. The administrative board and the Commanding Officers saw that evidence. More importantly, they had a greater opportunity to review the circumstances of this case and to observe and evaluate Strickland. Consequently, when as, here, the findings of the Commanding Officers and the administrative boards conflict with the opinions of the headquarters staffs, great deference to the operational Commanding Officers and require those who would reverse them to demonstrate a significant policy reason for doing so. To rule otherwise would be to undermine the authority of operational Commanding

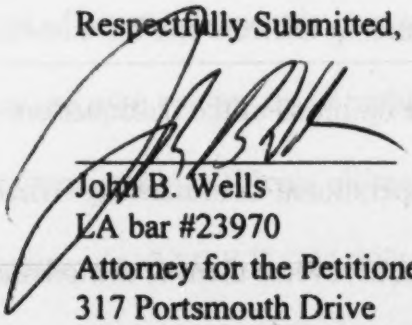
Officers. This could result in those in command choosing to exercise timidity rather than initiative and leadership in operational situations. The willingness of Commanding Officers to assert initiative, often in opposition to guidance issued by headquarters staffs, has played a significant role in U. S. domination of the battlespace.

Since this important area of the law is unsettled, granting certiorari is appropriate pursuant to Rule 10(c).

CONCLUSION

For the reasons delineated herein, petition prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,



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